

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CYNTHIA MINAFEE; CONSWEYLA
MINAFEE and LINDSEY RUDOLPH *on*
behalf of YAHAVEN PYLANT,

Plaintiffs,

vs.

No. CIV 20-0671 JB/LF

BERNALILLO COUNTY BOARD OF
COMMISSIONERS, *a governmental entity of*
the State of New Mexico; MANUAL
GONZALES, *Sheriff with the Bernalillo County*
Sheriff's Department; LEONARD ARMIJO,
individually and as Deputy Sheriff of the
Bernalillo County Sheriff's Department;
PATRICK RAEL, *individually and as Deputy*
Sheriff of the Bernalillo County Sheriff's
Department, and BERNALILLO COUNTY
SHERIFF'S DEPARTMENT,

Defendants.

ORDER¹

THIS MATTER comes before the Court on the Defendants' Motion to Dismiss Pursuant to Rule 12(b)(5), filed November 19, 2020 (Doc. 22) ("Motion"). The Court held a hearing on August 26, 2021. See Clerk's Minutes at 1, filed August 26, 2021 (Doc. 32). The primary issue is whether the Court should dismiss Defendants Bernalillo County Board of Commissioners, Manuel Gonzales,² Leonard Armijo, and Patrick Rael without prejudice under rule 12(b)(5) of the

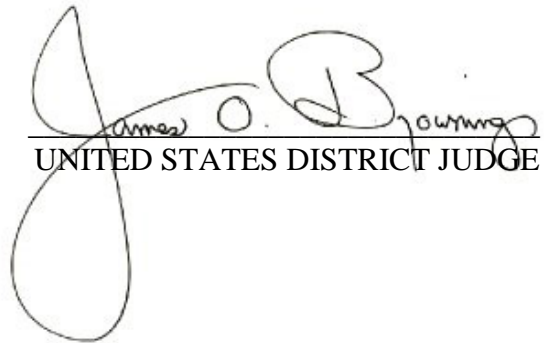
¹This Order disposes of Motion to Dismiss Pursuant to Rule 12(B)(5), filed November 19, 2020 (Doc. 22). The Court will issue a Memorandum Opinion at a later date fully detailing its rationale for its decision.

²The Defendants state that the Plaintiffs "incorrectly" name Manuel Gonzales "'Manual' Gonzales." Motion at 1. The Court adopts the Defendant's naming spelling.

Federal Rules of Civil Procedure, because: (i) Plaintiffs Cynthia Minafee, Consweyla Minafee, and Lindsey Rudolph on behalf of Yahaven Pylan did not serve the Defendants within ninety days after the Plaintiffs filed their Complaint for Violations of the New Mexico Constitution and Tort Claims, filed July 9, 2020 (Doc. 1-1)(“Complaint”)(filed in state court on July 6, 2020 and removed to federal court on July 9, 2020), as rule 4(m) of the Federal Rules of Civil Procedure requires; and (ii) the Honorable Laura Fashing, United States Magistrate Judge for the United States District Court for the District of New Mexico, recommends that Armijo, Gonzales, and Rael “be dismissed without prejudice pursuant to Rule 4(m),” Proposed Findings and Recommended Disposition, filed October 30, 2020 (Doc. 9)(“PFRD”). The Court concludes that it will deny the Motion, because, although the Plaintiffs admit that they “are unable to show good cause for untimely service,” Plaintiffs’ Response to Defendants’ Motion to Dismiss Pursuant to Rule 12(b)(5), filed December 2, 2020 (Doc. 24)(“Response”), (i) the Plaintiffs served the Defendants within four months of filing the Complaint and the Plaintiffs served the Defendants before the Motion was filed, see Espinoza v. United States, 52 F.3d 838, 840-41 (10th Cir. 1995)(“The plain language of Rule 4(m) . . . broadens the district court’s discretion by allowing it to extend the time for service even when the plaintiff has not shown good cause.”); Zamora v. City of Belen, No. CIV 03-743 JB/RLP, 2004 WL 3426121, at *4 (D.N.M. Aug. 9, 2004)(Browning, J.)(denying a motion to dismissing for untimely service even though the Plaintiffs had not shown good cause); and (ii) Magistrate Judge Fashing’s PFRD is not binding on the Court, see 28 U.S.C. § 636(b)(1)(C) (“A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.”); Fed. R. Civ. P. 72(b)(3) (“The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.”). See also Draft

Transcript of Hearing (taken August 26, 2021)(“Tr.”)(Court)(“I’m inclined to let the plaintiff go ahead and try to serve and get this case going . . .”).³

IT IS ORDERED that the Defendants’ Motion to Dismiss Pursuant to Rule 12(B)(5), filed November 19, 2020 (Doc. 22), is denied.



UNITED STATES DISTRICT JUDGE

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³The Court’s citations to any draft transcripts of hearings refer to the court reporter’s original, unedited version. Any final transcript may contain slightly different page and/or line numbers.